Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

(2)

No. 97-1039

In the Supreme Court of the United States

OCTOBER TERM, 1997

STEVEN L. MERRITT AND CAROL MERRITT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
IRENE M. SOLET
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioners' tort action arising from personal injury sustained as a result of allegedly negligent installation and maintenance of a sign located in a lake that is part of a multi-purpose federal flood control project.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 35 F.3d 1118 (7th Cir. 1994)	7
Boudreau v. *United States*, 53 F.3d 81 (5th Cir. 1995), cert. denied, 116 S. Ct. 771 (1996)	6
Boyd v. *United States*, 881 F.2d 895 (10th Cir. 1989)	7, 8
Cantrell v. *United States*, 89 F.3d 268 (6th Cir. 1996)	6, 8, 9
Dawson v. *United States*, 894 F.2d 70 (3d Cir. 1990)	6, 7
Dewitt Bank & Trust Co. v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990)	6, 8
E. Ritter & Co. v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989)	7
Fisher v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994)	6
Fryman v. *United States*, 901 F.2d 79 (7th Cir.), cert. denied, 498 U.S. 920 (1990)	6, 8, 10
Henderson v. *United States*, 965 F.2d 1488 (8th Cir. 1992)	7, 8
Hiersche v. *United States*, 933 F.2d 1014 (9th Cir. 1991), cert. denied, 503 U.S. 923 (1992)	6
Holt v. *United States*, 46 F.3d 1000 (10th Cir. 1995)	6

Cases—Continued: Page

McCarthy v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989) .. 3, 4, 6, 7, 9
Mocklin v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) 6
Reese v. *South Florida Water Mgmt. Dist.*, 59 F.3d 1128 (11th Cir. 1995) 6
Thomas v. *United States*, 959 F.2d 232 (4th Cir. 1992) 6
United States v. *James*, 478 U.S. 597 (1986) 4, 5
Washington v. *East Columbia Basin Irrig. Dist.*, 105 F.3d 517 (9th Cir.), cert. denied, 118 S. Ct. 364 (1997) 6, 9
Williams v. *United States*, 957 F.2d 742 (10th Cir. 1992) 7
Zavadil v. *United States*, 908 F.2d 334 (8th Cir. 1990), cert. denied, 498 U.S. 1108 (1991) 6

Statutes and rules:

Flood Control Act of 1928, 33 U.S.C. 702a *et seq.* 2
33 U.S.C. 702c 2, 3, 4, 5, 6, 8, 9, 10
Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.* .. 2
Fed. R. Civ. P. 12(b)(1) 2
Ninth Circuit Rule 36-3 11

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1039

STEVEN L. MERRITT AND CAROL MERRITT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is unreported. The opinion of the district court (Pet. App. 8a-13a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1997. A petition for rehearing was denied on November 14, 1997. Pet. App. 1a. The petition for a writ of certiorari was filed on December 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Steven Merritt was injured in 1992 when his boat collided with a wooden sign located in the water of Lake Havasu in Arizona. Pet. App. 3a. The sign, erected and maintained by the United States Fish and Wildlife Service to mark the boundary of the Havasu National Wildlife Refuge, was not visible at night because it had no lights or reflective markings. *Id.* at 3a, 8a.

Lake Havasu is part of the Parker Dam project, which was authorized by Congress as a flood control project. Pet. App. 11a. The lake, and Parker Dam below it, are used for controlling floods and flood waters. *Ibid.* In particular, the top ten feet of water elevation in Lake Havasu are used to control the flood peak inflows from tributaries of the Colorado River between Parker Dam and the upstream Hoover Dam. *Ibid.*

2. Petitioners Steven Merritt and Carol Merritt filed this action against the United States pursuant to the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, in the United States District Court for the District of Arizona, alleging that Steven Merritt's injuries resulted from negligent installation and maintenance by the federal government of the sign with which his boat collided. Pursuant to Federal Rule of Civil Procedure 12(b)(1), the United States moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States is immune from liability pursuant to the Flood Control Act of 1928, 33 U.S.C. 702a *et seq.* Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

The district court granted the government's motion to dismiss. Pet. App. 13a. The court noted that the water level of Lake Havasu is monitored and discharged when necessary for flood control purposes. *Id.* at 11a. Its own task, according to the court, was to determine "if there is a sufficient nexus between the injury sustained by Merritt and the operation of the Congressionally authorized federal flood control project." *Ibid.* The court observed that "ongoing monitoring and discharge of water levels may constitute a sufficient nexus" to invoke Section 702c. *Ibid.* Noting that "[t]he presence of flood water in a federal flood control project created the condition upon which Merritt engaged in recreational boating" —and that "[t]he waters upon which the casualty occurred, and in which the sign was set, are authorized, monitored, and used for flood control purposes"—the district court concluded that Steven Merritt's injuries were not " 'wholly unrelated' to a congressionally authorized flood control project." *Id.* at 12a (quoting *McCarthy* v. *United States*, 850 F.2d 558, 562 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989)).[1]

---

[1] In *McCarthy*, the court upheld the government's claim of immunity in a suit by a swimmer severely injured when he dove into shallow water of a federal flood control lake. The court noted that "[a]lthough McCarthy's injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake." 850 F.2d at 561. The court concluded that "because waters contained in a federal flood control project for purposes related to flood control were a substantial factor in bringing about McCarthy's injuries," those injuries

The district court therefore held that those injuries were within the scope of Section 702c.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 2a-7a. The court reiterated its longstanding test for application of Section 702c, holding that the immunity insulates the government from liability "so long as the damage or the injury [is] not wholly unrelated to a Congressionally authorized flood control project." *Id.* at 4a (quoting *McCarthy*, 850 F.2d at 563) (internal quotation marks omitted). The court rejected petitioner's argument that the connection between the injury in question and federal flood control activities was more attenuated here than in earlier Ninth Circuit decisions applying Section 702c and that this case therefore did not satisfy the circuit's existing test for application of the immunity. Relying on this Court's emphasis in *United States* v. *James*, 478 U.S. 597 (1986), on the "sweeping language" of Section 702c (Pet. App. 5a (quoting *James*, 478 U.S. at 608)) and on its own earlier "broad holding" in *McCarthy*, the court of appeals concluded that "only a minimal causal nexus [between an injury and a federal flood control project] is required for immunity to attach." Pet. App. 5a. The court noted that Lake Havasu "continues to be used for flood control purposes" and that that use provided a "sufficient nexus" between a federal flood control project and petitioner's injury to support application of Section 702c. *Id.* at 4a-5a. The court of appeals further observed that evidence in the record "suggests that the

---

were not " 'wholly unrelated' to any Act of Congress authorizing expenditures of funds for flood control"—the circuit's longstanding test for application of Section 702c. *Id.* at 561-562.

water levels at Lake Havasu may have played a role" in Steven Merritt's injuries. *Id.* at 5a-6a.

ARGUMENT

When Congress embarked upon a multi-decade program to construct dams and other structures for flood control in 1928, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

This Court broadly construed the scope of that immunity in *United States* v. *James*, 478 U.S. 597 (1986), holding that it extends both to property damage and to personal injury. *Id.* at 605. The Court interpreted the terms " 'flood' and 'flood waters' " to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control." *Ibid.* The "sweeping language" of Section 702c and the "equally broad and emphatic language" of its legislative history supported recognition of a broad immunity for the United States. *Id.* at 608. Accordingly, the Court concluded, "the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Ibid.*

1. Contrary to petitioners' submission (Pet. 5-6), the post-*James* decisions of the courts of appeals do not create a "sharp split" between those adopting the Ninth Circuit's "wholly unrelated to flood control" test and others requiring "some sort of nexus"

between government flood control activities and the plaintiff's injuries.[2] Both approaches require a con-

---

[2] At least eleven cases involving personal injuries on or in federal flood control lakes have held that the government is immune from suit. See *Reese* v. *South Florida Water Mgmt. Dist.*, 59 F.3d 1128 (11th Cir. 1995) (holding government immune from claim involving recreational boating accident at federal flood control lake); *Boudreau* v. *United States*, 53 F.3d 81 (5th Cir. 1995) (injury to recreational boater during Coast Guard rescue), cert. denied, 116 S.Ct. 771 (1996); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (recreational diving accident); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (accident involving professional diver inspecting dam's underwater fish screens), cert. denied, 503 U.S. 923 (1992); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (recreational diving accident), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (recreational swimming accident); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (swimming accident); *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988) (diving accident), cert. denied, 489 U.S. 1052 (1989); see also *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995) (government immune from suit where mist from water released from dam created ice slick on adjacent road). Property damage caused by an irrigation component of a federal flood control project likewise has been determined to be within the scope of Section 702c. See *Washington* v. *East Columbia Basin Irrig. Dist.*, 105 F.3d 517 (9th Cir.), cert. denied, 118 S. Ct. 364 (1997).

Four cases have rejected the United States' immunity defense. Those cases have involved activities unrelated to the project's flood control functions or waters found not to be "flood waters" within the meaning of Section 702c. See *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no

nection between the government's management of flood waters and the injury in question. Any difference concerns only how substantial that nexus must be.

In practical application, moreover, the difference between the formulations is not always easy to discern. For example, the Third Circuit (a "wholly unrelated" jurisdiction) has suggested that an injury may be "wholly unrelated" to flood control if waters contained by the flood control project are not "a substantial factor in [causing] injuries." *Dawson* v. *United States*, 894 F.2d 70, 74 (1990) (citing *McCarthy* v. *United States*, 850 F.2d 558, 561-562 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989)). See also *Bailey* v. *United States*, 35 F.3d 1118, 1121 (7th Cir. 1994) (noting that "in practice, the Eighth Circuit's 'substantial factor' analysis operates much like the 'wholly unrelated' inquiry as applied by the Third Circuit in *Dawson*.") The two approaches thus have produced similar results. Compare, *e.g.*, *McCarthy*, 850 F.2d at 562 (holding government immune under "wholly unrelated" test from claim by swimmer injured by dive into shallow water of federal flood control project); *Dewitt Bank & Trust Co.* v. *United*

---

immunity from claim by recreational boater injured in Army Corps of Engineers rescue); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity from claim by wade fisherman); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity from claim by snorkeler struck by boat); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet reached flood control project); see also *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992) (concluding, on basis of record evidence and language of authorizing statute, that particular project was not flood control project).

States, 878 F.2d 246, 247 (8th Cir. 1989) (same result on similar facts under "substantial factor" test); *Fryman* v. *United States*, 901 F.2d 79, 82 (7th Cir.) (same result on similar facts in opinion questioning "wholly unrelated" test and suggesting flood control activities must "increase the probability" of injury to support immunity), cert. denied, 498 U.S. 920 (1990). Where no such sufficient nexus on particular facts is demonstrated, courts have rejected the defense. See *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for alleged negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake). The linguistic differences among the circuits, therefore, have not produced any fundamentally different outcomes in cases.

Only the Sixth Circuit has departed from this fact-specific inquiry into the causal connection between the particular injury involved and federal flood control activities, requiring instead a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c. See *Cantrell* v. *United States*, 89 F.3d 268, 273 (6th Cir. 1996) (no immunity where alleged tort—negligent piloting of Army Corps of Engineers rescue boat on flood control lake—was unrelated to federal flood control efforts). The Sixth Circuit has yet to apply its test to additional cases, however, and it is not yet clear that, in practice, its test will produce results significantly different from those under the

nexus inquiry used in all other circuits. Indeed, the Sixth Circuit itself acknowledged that "the differences between the circuits have more to do with the facts of the particular cases that the circuit courts have heard than with a dispute about the meaning of §702c." *Id.* at 272. Petitioners offer no persuasive reason for the Court to grant review—especially since this Court has denied petitions for writs of certiorari raising the nexus issue in recent Terms, including one this Term seeking review of a Ninth Circuit decision issued after *Cantrell*.[3]

2. Petitioners contend (Pet. 9) that this case merits review because the Ninth Circuit, while stating that it was applying its longstanding "wholly unrelated" to flood control test, has departed from its previous decisions by essentially eliminating the requirement of any factual nexus between a plaintiff's injury and flood control. Even if the court of appeals' opinion were read so broadly, however, review is unwarranted because the decision is unpublished and because the record below in any event establishes a clear factual nexus between the injury in this case and federal flood control activities.

The court of appeals itself acknowledged that "the deposition of Gregory Wolf suggests that the water levels at Lake Havasu may have played a role in Mr. Merritt's injuries, as water levels did in [*McCarthy*, 850 F.2d 558]." Pet. App. 5a-6a. In particular, Mr. Wolf, an employee of the United States Fish and Wildlife Service at the Havasu National Wildlife Refuge, testified that the sign with which petitioner's

---

[3] See *East Columbia Basin Irrig. Dist.* v. *United States*, 118 S. Ct. 364 (1997). Three of those cases arose in the Ninth Circuit, and four in other circuits. See note 2, *supra*.

boat collided was located on an island in the lake that was submerged at some times of the year and exposed at other times because of the fluctuation of the lake's water level. C.A. E.R. 29. Similarly, James Ronald Good, Manager of the Havasu National Wildlife Refuge, testified that the sign was on dry land at some times and at others protruded above the surface of the water as the level of the lake varied. *Id.* at 48. The district court found that those fluctuations in the lake's elevation were caused by discharges of water at Parker Dam by the government for flood control purposes. Pet. App. 11a.

The complaint alleges that Steven Merritt's injury was caused by government negligence in erecting and maintaining a sign that, because it was made of dark materials and was unmarked by warning lights or buoys, represented a hazard to the boating public. Pet. 2; C.A. E.R. 3 (Complaint). As we have shown, however, the flood control functions of Lake Havasu directly affected, indeed created, the hazardous condition of which petitioners complain: an unmarked sign *in open water* when flood waters were high. This case thus closely resembles *Fryman, supra*, which petitioners cite with apparent approval (Pet. 9). There, the Seventh Circuit noted that fluctuations in the level of a flood control lake made warnings to recreational users difficult and increased the likelihood of injury. 901 F.2d at 82. Similarly here, "'the problem' is attributable in substantial part to the nature of a flood-control project." *Ibid.*

Because the facts in this case satisfy the nexus requirement for application of Section 702c that most appellate decisions since *James* have established and that petitioners would have this Court impose, and because the Ninth Circuit's unpublished decision has

no precedential value (see Ninth Circuit Rule 36-3), further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
IRENE M. SOLET
Attorneys

FEBRUARY 1998